No. 340

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In the Supreme Court of the United States

OCTOBER TERM, 1970

W. ASTOR KIRK AND VIVIAN M. KIRK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (JA 15-28)[1] is reported at 51 T.C. 66. The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 425 F. 2d 492.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1970. A petition for rehearing was de-

[1] "JA" references are to the joint appendix originally filed in the court of appeals and now on file in this Court.

nied on April 9, 1970. The petition for a writ of certiorari was filed on July 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the courts below correctly held that petitioner,[2] an employee of a church agency who concededly was not a minister and whose services were of a secular nature, was not entitled to the benefits of Section 107 of the Internal Revenue Code, which excludes from the gross income of a "minister of the gospel" compensation paid to him in the form of a rental allowance.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

* * * *

SEC. 107. RENTAL VALUE OF PARSONAGES.

In the case of a minister of the gospel, gross income does not include—

[2] References to petitioner are to W. Astor Kirk. Vivian M. Kirk is a party to this proceeding only by reason of the filing of a joint income tax return.

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.

STATEMENT

Petitioner was one of twelve professional employees of the General Board of Christian Social Concerns of the Methodist Church during 1964, the taxable year here in issue (Pet. App. 2a; JA 16-17). This Board promotes, sponsors and administers programs of social research, education, and action with respect to a broad range of social issues and problems, including civil liberties and race relations (JA 17). Petitioner was a member of the Methodist Church, which provides for ordination of its ministers, but he was not an ordained, commissioned, or licensed minister of the gospel and had no intention of becoming one (JA 9-10; Pet. App. 2a).

Nine of the twelve professional employees of the Board were ordained ministers of the Methodist Church (JA 11, 17; Pet. App. 2a). The services performed by petitioner were not different in character from those performed by the eleven other professional employees. They were not sacerdotal in character and did not involve the conduct of religious worship, but were of a secular nature. (JA 13, 17, 26; Pet. App. 2a.)

As an employee of the Board, petitioner received a rental allowance from the Board of $2,624.97 in 1964 (JA 13, 20; Pet. App. 2a). This rental allow-

ance constituted a part of petitioner's remuneration for services rendered to the Board and was used in 1964 for rent or for otherwise providing him a home (JA 13-14, 20; Pet. App. 3a).

Petitioner did not report the rental allowance on his 1964 tax return, although he did make full disclosure of the fact that the sum was not reported, claiming that it was excludable from his gross income under Section 107 of the Internal Revenue Code of 1954 (JA 13, 20; Pet. App. 2a-3a). The Commissioner disallowed the claimed rental allowance exclusion (JA 21), and the Tax Court sustained the Commissioner's determination on the ground that petitioner concededly was not an "ordained, commissioned, or licensed minister," as required by Section 107 and the applicable regulations (JA 21-27). The court deemed it unnecessary to pass on petitioner's further contention that Section 107 is unconstitutional, since petitioner would not be entitled to the benefits of that section if it were declared invalid (JA 27-28). On appeal, the Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. 1a-6a).

ARGUMENT

The decision below, affirming that of the Tax Court, is correct. There is no conflict or any other reason for further review.

1. Section 61(a)(1) of the Internal Revenue Code of 1954, *supra*, p. 2, defines "gross income" as "all income from whatever source derived," including "Compensation for services." Section 107(2), *supra*, pp. 2-3, provides that "In the case of a minister of the

gospel, gross income does not include * * * the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home." [3] The special tax exemption benefit accorded by Section 107, like any other tax exemption, is a matter of legislative grace and must be strictly construed. See *United States* v. *Stewart*, 311 U.S. 60, 71; *Better Business Bureau* v. *United States*, 326 U.S. 279, 283; *Bingler* v. *Johnson*, 394 U.S. 741, 751-752. Since petitioner concedes (Pet. 4), as was stipulated below (JA 9-10), that he was not an ordained, commissioned, or licensed "minister of the gospel" within the meaning of Section 107 and the applicable Treasury Regulations,[4] the court below properly upheld the

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[3] Section 107 had its origin in Section 213(b)(11) of the Revenue Act of 1921, c. 136, 42 Stat. 227, which allowed an exclusion for "The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." The statute was apparently enacted as a result of a Treasury Ruling, O.D. 862, 4 Cum. Bull. 85, to the effect that the fair rental value of the use of a church parsonage by a clergyman constituted taxable compensation for services. See Zipperstein, *Taxation of Clergymen*, 41 Taxes 219. In 1954, Congress extended the exclusion to cash allowances paid to ministers who do not live in church-furnished homes, to place them on an equal tax footing with those to whom housing is provided. S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 16, 186.

[4] Treasury Regulations on Income Tax (1954 Code), Section 1.107-1(a) (26 C.F.R.), provide in part that:

> § 1.107-1 *Rental value of parsonages.*
>
> (a) * * * (2) * * * In order to qualify for the exclusion, the home or rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister of the gospel. In general, the rules

Tax Court's decision that he did not qualify for the income-exclusion benefits granted by Section 107.

2. As pointed out by both courts below (JA 26-28; Pet. App. 6a), petitioner's challenge to the constitutionality of Section 107, even if upheld, cannot aid his cause. For if the section were deemed invalid because constitutionally impermissible, the result would be to deny its benefits to those who would otherwise qualify for them—"ministers of the gospel"—not to extend them to other taxpayers who, like petitioner, fall outside that category. In the words of the court below (Pet. App. 6a), to declare Section 107 unconstitutional "would not affect the [petitioner's] tax liability in this case. Rather ministers of the gospel would then no longer be entitled to the benefits of the exclusion." Under these circumstances, there is no reason to consider petitioner's constitutional claim on the merits. This is not a case where a taxpayer who does not contest his tax liability, brings an action to test the validity of a federal taxing statute or spending program. Compare *Flast* v. *Cohen*, 392 U.S. 83. On the contrary, petitioner disputes his tax liability and brought this action in the Tax Court for a redetermination of that liability.

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provided in § 1.1402(c)-5 will be applicable to such determination. * * *

Treasury Regulations, Section 1.1402(c)-5, referred to above, repeat the language of Section 1402(c)(4) of the Code, which excludes from the self-employment provisions of the social security tax "the performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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